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subject to garnishment, the creditor could acquire no lien on the proceeds of such general tax. Suppose the City, when the tax was collected, should refuse to pay the judgment-creditor, could not the Courts compel it to do so by *mandamus* or other appropriate remedy? Suppose the City should act in bad faith and misappropriate the tax, could not the Courts, by injunction or otherwise, protect the creditor and compel the City to do right? But suppose the City, without acting in positive bad faith, should need or appropriate all the general tax in carrying on the legitimate functions of the corporation, such as paying officers, repairing streets, &c., &c., can it be restrained from so doing by a judgment-creditor? Has a judgment-creditor, under such circumstances, the right to be paid and to insist, if necessary, that the officers of a city, or at least that those who extend credit to it afterwards, shall take the scrip or credit of the city, and in their turn obtain judgment and payment? Has a judgment-creditor any greater rights than a non-judgment creditor? If so, are judgments to be paid in the order of their date? These and similar queries of a like practical character may be started, to many of which it would be difficult to find answers in cases already adjudged. They open to an inviting field, on the confines of which even, we cannot enter at this time. We propose to give the results of our explorations of it on a future occasion, if not anticipated by others. J. F. D.

DAVENPORT, Iowa.

Supreme Court of Maine.

SUMNER A. PATTEN *vs.* ANDREW WIGGIN.

Physicians and surgeons who offer themselves to the public as practitioners, impliedly promise thereby, that they possess the requisite knowledge and skill to enable them to treat such cases as they undertake with reasonable success.

This rule does not require the possession of the highest, or even the average, skill, knowledge, or experience, but only such as will enable them to treat the case understandingly and safely.

The law also implies that in the treatment of all cases which they undertake, they will exercise reasonable and ordinary care and diligence.

They are also bound always to use their best skill and judgment in determining the nature of the malady and the best mode of treatment, and in all respects to do their best to secure a perfect restoration of their patients to health and soundness.

But physicians and surgeons do not impliedly warrant the recovery of their patients, and are not liable on account of any failure in that respect, unless through some default of their own duty, as already defined.

If the settled practice and law of the profession allows of but one course of treatment in the case, then any departure from such course might properly be regarded as the result of want of knowledge, skill, experience, or attention.

If there are different schools of practice, all that any physician or surgeon under-

takes is, that he understands, and will faithfully treat the case according to, the recognised law and rules of *his* particular school.

Action, assumpsit on account annexed. One portion of the account is for professional services as a physician, in attendance on defendant's minor son.

The defence to this portion of the claim was malpractice in the treatment of the patient, and such ignorance, want of skill and judgment on the part of the plaintiff in managing professionally the case under his care, that the patient was more injured than benefited by his treatment, and that on the whole case he was not reasonably entitled to recover anything for his services.

Evidence was introduced on both sides as to such treatment and management by the plaintiff, during the whole time the patient was under his care.

The Court (Judge KENT) instructed the jury that if the plaintiff had been guilty of malpractice, or neglect, or want of ordinary care and skill, within the rules hereafter stated, it would be a defence to that part of the claim which related to the treatment of plaintiff's son,—the Court instructed the jury as follows:—

1. When a man offers himself to the public or to patients as a physician or surgeon, the law requires that he be possessed of that reasonable degree of learning, skill, and experience which is ordinarily possessed by others of his profession who are in good standing as to qualifications, and which reasonably qualify him to undertake the care of patients.

This rule does not require that he should have the highest skill, or largest experience, or most thorough education, equal to the most eminent of the profession in the whole country; but it does require that he should not, when uneducated, ignorant, and unfitted, palm himself off as a professional man, well qualified, and go on blindly and recklessly to administer medicines, or perform surgical operations. The rule above stated is the true one.

But a physician qualified within this rule may be guilty of negligence or malpractice.

2. The law requires, and implies, as part of the contract, that when a physician undertakes professional charge of a patient,

he will use reasonable and ordinary care and diligence in the treatment of the case.

3. The law further implies, that he agrees to use his best skill and judgment, at all times, in deciding upon the nature of the disease, and the best mode of treatment, and the management generally of the patient. The essence of the contract is, that he is to do his best—to yield to the use and service of his patient his best knowledge, skill, and judgment, with faithful attention by day and night as reasonably required. But there are some things that the law does not imply or require. He is not responsible for want of success in his treatment, unless it is proved to result from want of ordinary care, or ordinary skill and judgment. He is not a warranter of a cure, unless he makes a special contract to that effect. If he is shown to possess the qualifications stated in the first proposition, to authorize and justify him in offering his services as a physician, then if he exercises his best skill and judgment, with care and careful observation of the case, he is not responsible for an honest mistake of the nature of the disease, or as to the best mode of treatment, when there was reasonable ground for doubt or uncertainty.

If the case is such that no physician of ordinary knowledge or skill would doubt or hesitate, and but one course of treatment would by such professional men be suggested, then any other course of treatment might be evidence of a want of ordinary knowledge or skill, or care and attention, or exercise of his best judgment, and a physician might be held liable, however high his former reputation. If there are distinct and differing schools of practice, as Allopathic or Old School, Homœopathic, Thompsonian, Hydropathic, or Water Cure, and a physician of one of those schools is called in, his treatment is to be tested by the general doctrines of his school, and not by those of other schools. It is to be presumed that both parties so understand it. The jury are not to judge by determining which school, in their own view, is best. Apply these rules to the evidence.

Then, as to medical and surgical treatment of the case,—was there, or was there not, a want of ordinary skill and judgment,

such as to render the plaintiff liable within the above rules—such evidence as satisfies you that he either did not possess the education, judgment, and skill which authorized him to undertake the case and enabled him to treat it with ordinary skill, or that he was guilty of that neglect or carelessness in the treatment or investigation of the case which showed that he did not faithfully and honestly apply his skill, and knowledge, and best judgment.

Defendant requested the Court to give the following instruction :—

A physician who, upon request and in consideration of being paid for his services, takes charge of the case of a diseased person, warrants that he possesses and promises to exercise the knowledge, skill, and care requisite to enable him to understand the nature of his disease, and to treat it properly, but the degree of such knowledge, skill, and care is not that which is possessed and exercised by physicians of the highest knowledge, skill, and care, but it is that possessed by physicians of ordinary knowledge, skill, and care.

The Judge declined to give this, except as given in former instructions.

The Judge, in his charge, also instructed the jury, that in cases where authorities differ, or "doctors disagree," the competent physician is only bound to exercise his best judgment in determining which course is, on the whole, best.

Verdict for plaintiff for the amount of his bill, to which rulings and refusal the defendant excepted.

The case on the exceptions was argued before the Law Court at the May Term, 1862, and the rulings of the Judge at the trial were sustained, and the exceptions overruled.

C. A. Everett and *J. H. Rice*, for plaintiff.

A. Sanborn, for defendant.

We publish the foregoing case because it covers the entire ground of the very interesting subject. The history of the legal responsibility of medical practitioners and surgeons, for malpractice, is curious. Physicians are regarded as a higher rank in the profession than surgeons, and are not allowed by the English common law to recover pay for their services, or even for medicines furnished by them; their fee being regarded as merely an honorary gratuity, the same

as in the case of a counsellor at law. But surgeons and apothecaries have always been allowed to maintain actions to recover compensation for their services, the same as the subordinate ranks of the profession of the law. And in this country no distinction has been made between physicians and surgeons. Both are allowed to maintain actions for their services, and both are liable to actions for malpractice. And in the recent English case of Attorney-General *vs.* The Royal College of Physicians, 7 Jur. N. S. 511, it was held that physicians might recover for their services on a special contract.

These actions have been not uncommon in the case of surgeons for a great number of years, both in England and America. Surgery is there regarded much in the nature of a mechanical trade, and a similar degree of responsibility is attached to the practice of it. It was originally confined almost exclusively to the barbers, in London and throughout Great Britain. But the great amount of learning and skill required in the practice of surgery has rendered it a highly respectable and liberal profession throughout the world, ranking, in many respects, even higher than the practice of medicine. But the laws of that profession are far more clearly defined, and the consequences of departure from them much more fully understood, than in that of medicine; so that actions are more likely to be brought, for such departures from the law of the profession, in surgery than in medicine, since, being better defined, they are consequently more susceptible of proof.

The rule of law applicable to this class of actions is commonly expressed in much the same terms which we apply to any other pecuniary responsibility. It is, that one who allows himself to be employed, in any department of the profession, impliedly undertakes that he possesses such degree of learning, experience, and skill as renders it safe and proper for him to undertake that particular business, and that he will exercise these faculties in a careful and faithful manner. This is the rule laid down in the principal case, and is sustained by numerous reported cases. Landon *vs.* Humphrey, 9 Conn. R. 209; Howard *vs.* Grover, 28 Maine R. 97; Wood *vs.* Clapp, 4 Sneed 65. But a rule of law laid down in such general terms is not much aid to a jury, or much guide to any one, in determining such questions as arise upon this subject.

1. It may be assumed that there is some definite rule, or some well-understood course, for the management of cases, both in medicine and surgery. This rule is the law of the medical profession for that case. There may be cases where different rules obtain and are sanctioned by allowable authority. In such cases there is a discretion allowed the practitioner. But every case of this kind must be tried by the *law* of the *medical profession*, and this law is the law of the case, and it must be established by witnesses of skill and experience in that profession. BLACK, C. J., in McCandless *vs.* McWha, 22 Penn. St. R. 261, 274.

2. When the *law*, or *laws*, of the *medical profession* have been once established, in any particular case, to the satisfaction of the triers, it will be safe to affirm, that every practitioner who allows himself to be employed in that particular case, impliedly assumed and promised to his employer, that he knew the approved or allowable rules or laws of the profession applicable to that case, and that he would practise them with reasonable care, skill, and diligence. It is not important whether these laws,

obtaining in the profession at any given period, are wise or foolish, reasonable or unreasonable, any more than it is in regard to the law of the land. If it *be the law*, it *must* be followed. And to this end, all that is requisite is that it be the settled, generally received, or at least, allowable, practice of the profession, *at that time.*

3. Questions often arise in regard to the extent of the discretion of the practitioner in the treatment of cases. Where the course of practice in the profession is uniform and entirely settled, any one who departs from it must do so at his peril. And if any bad results follow in consequence to the patient, the medical man is responsible, not only for all pecuniary damages, but even to criminal prosecution in certain cases. Slater *vs.* Baker, 2 Wilson 359. And it is no excuse that the practitioner is very skilful and experienced, and that he departed from the general course of practice in his profession, with an honest expectation of benefiting his patient. In the case last cited, the defendant had been for twenty years the first surgeon in St. Bartholomew's Hospital, London. The Court nevertheless held him responsible in damages for the unfortunate and unforeseen consequences to his patient, saying, That if this was the first experiment of the kind, it was rash, "and he who acts rashly acts ignorantly," "and although the defendant, in general, may be as skilful as any gentleman in England," in his profession, yet, in this particular case, he acted ignorantly, rashly, and unskilfully, "contrary to the known rule and usage of surgery." The same principle is maintained in Speare *vs.* Prentice, 8 East 348, and in Lamphier *vs.* Phips, 8 C. & P. 475, where TINDAL, C. J. (C. P.), gives a very clear and satisfactory exposition of the duty of surgeons and physicians. And a surgeon, or physician, may become responsible for the mistake or neglect of his apprentice while acting on his behalf. Heineke *vs.* Hooper, 7 C. & P. 81.

4. One who acts in the capacity of surgeon or physician, as expressed by BAYLEY, B., in Rex *vs.* Long, 4 C. & P. 423, 440, and "has acted with *gross and improper rashness and want of caution*," and the life of the patient is thereby sacrificed, will be liable to punishment criminally. There is also a case of considerable interest, Commonwealth *vs.* Thompson, 6 Mass. R. 134, where the founder of the Thompsonian practice, consisting in the use of vegetable stimulants, who destroyed the life of one of his patients by the too free use of lobelia, in repeated doses, was indicted for wilful murder. The accused was tried before Chief Justice PARSONS and a full Court, and defended by the late Mr. Justice STORY, then at the bar. The case presented the most deplorable ignorance in the respondent, and a degree of foolhardy presumption and dogged perseverance, which certainly should have exposed him to a conviction for manslaughter. But the law was laid down so favorably to the right of the people to be cured, or killed, in their own way, that the trial resulted in an acquittal. And the rule of the English law has been laid down very favorably to the accused in such cases. In Rex *vs.* Martin, 2 Carrington & Payne 625, in a trial at the Old Bailey, before three Judges, it was decided, That if a person, *bona fide* and honestly exercising his best skill to cure a patient, perform an operation, which causes the patient's death, he is not guilty of manslaughter, and it makes no difference whether such person be a regular surgeon or not; nor whether he has had a regular medical education or not. But the rule in most of the English cases

upon this subject is, that where an ignorant man, without any necessity, voluntarily undertakes delicate and difficult operations in surgery, and is therein guilty of gross ignorance or reckless disregard of life, and death ensues, he is guilty of manslaughter. Rex *vs.* Long, 4 C. & P. 398. Rex *vs.* Stimpson, in note to the last case; where Mr. Justice BAYLEY said, "If a person not of medical education, where professional aid might be obtained, undertakes to administer medicine which might have a dangerous effect, and thereby occasions death, such person is guilty of manslaughter."

5. The cases in this country where the responsibility of the medical profession has been brought in question, have been mostly civil actions. And it does not seem that the medical man is in general responsible for mere mistakes or errors in judgment. McLallen *vs.* Adams, 19 Pick. 333, where the employer attempted to defend against the surgeon's action for his bill of fees, and it was held that where the wife of the defendant was afflicted with a dangerous disease, and was carried by him a distance from home and left under the care of the plaintiff as surgeon, and after the lapse of some weeks the plaintiff performed an operation for her cure, soon after which she died; that the performance of the operation was within the scope of the plaintiff's authority, if in his judgment it was necessary or expedient, and that he was not bound to prove that it was necessary under the circumstances. It has sometimes been considered that the case of Howard *vs.* Grover, 28 Maine 97, made the surgeon responsible for the consequences of an error in judgment in amputating a limb so far from the body as not to remove all of the diseased bone. But if that was intended to be there decided, the case is not maintainable either upon principle or authority. But we do understand that case as having gone that length, precisely. It is there expressly said that the defendant is not liable for want of the highest degree of skill, and a distinction is adverted to between the degree of skill to be expected from country practitioners and those who have the advantage of extensive city hospital practice.

6. A professional man is as much bound to keep pace with the advance of knowledge in his department, as he is to study its laws, originally. McCandless *vs.* McWha, 22 Penn. St. R. 261. But he is not an insurer of the recovery and final perfect restoration of his patients, either in medicine or surgery. Since the cure of a broken limb, even if so fractured as ordinarily to result in a perfect cure, is liable to many contingencies which do not attend mere dead mechanism. McCandless *vs.* McWha, *supra.* But in the trial of an action to recover the amount of a dentist's bill, Chief Justice SHEPLEY charged the jury, "that if the plaintiff exercised all the knowledge and skill to which the art had at the time advanced, that would be all that would be required of him;" but the full bench regarded this as too high a standard of professional duty, and ordered a new trial. Simonds *vs.* Henry, 39 Maine 155.

7. Nor is any man in any profession bound to exercise the highest degree of skill and science. The character of these attainments in different persons in all professions and pursuits is of almost infinite variety in amount and degree of perfectness. The extent of one's practice very soon makes the greatest possible difference in the fees demanded by him for difficult operations, and also in his skill, resulting from that dexterity which can only be acquired by such enlarged practice. So that the mere novice, who is known not to have

had any experience in his profession, by no means undertakes for the same degree of skill, with the practitioner of half a century. So also the country practitioner in a remote provincial town cannot be said to owe the same degree of skill to his patients as he who has had the advantages of constant and extensive city and hospital practice. The most which inexperienced practitioners owe, either to themselves or their patients, is, not to be persuaded to undertake matters in their profession of such difficulty as to be beyond their knowledge and experience. It is perhaps here that medical men are most liable to fail in the performance of duty. Wood *vs.* Clapp, 4 Sneed 65.

8. The case of Piper *vs.* Menifee, 12 B. Monr. 465, presents rather a curious question in regard to the responsibility of the medical profession. The plaintiff who sued for his fees had, during his attendance upon the defendant, also attended patients infected by small-pox, and by the want of proper care had communicated the infection to the defendant and his family, whereby the plaintiff's bill for attendance was greatly increased, for which defendant claimed a deduction. The Court held that the plaintiff could not recover for the additional services rendered necessary by his own want of proper care, and that the defendant was entitled to a further deduction from that portion of the bill which was properly chargeable, sufficient to reimburse him for all damages which he had sustained by bodily suffering and loss of time.

9. The law presumes that physicians and surgeons perform their duty unless the contrary be shown, as in other cases where misconduct is charged. Bellinger *vs.* Craigue, 31 Barb. Sup. Ct. R. 534.

It may be of interest to the profession to know that Mr. Elwell, of New York, has within the last few years published a book upon this subject, which, as a first attempt in this department of the law, is not obnoxious to criticism, and will be found very useful to those who may have occasion to prepare causes for trial involving questions of this kind.

We have said nothing in regard to the degree of care and diligence required in the practice of medicine and surgery, because it is well understood in the profession, and there is no conflict in regard to the rule. It is such as a careful and trustworthy man would be expected to exercise in a case of equal importance. Different cases require very different degrees of watchfulness and attention. This is required to be in proportion to the importance and difficulty of the case. The cases bearing on the general question of care and diligence are collected and digested in Briggs *vs.* Taylor, 28 Vt. R. 180. I. F. R.